U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

January 17, 2020

BY ECF

The Honorable Paul G. Gardephe
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

Re: *United States v. Michael Avenatti*, S1 19 Cr. 373 (PGG)

Dear Judge Gardephe:

The Government respectfully writes in response to the defendant's letter of last night (Dkt. No. 159, re-filed at Dkt. No. 161) ("Def. Ltr."), styled as a "supplemental reply memorandum of law," in which the defendant asserts that this Court should hold a "*Daubert/Kumho* hearing" to resolve a so-called "choice of law" question before trial. This claim is both belated and meritless.

As an initial matter, the defendant offers no explanation as to why he waited nearly three months to make such a claim, failing to raise it, in any form, prior to the deadline for motions *in limine*, in any of the prior (and extensive) submissions regarding expert testimony, or at oral argument on the same subject.

- The Government provided initial expert notice on November 22, 2019 (Dkt. No. 83-1), the date agreed upon by the parties. That notice stated, among other things, that the "Government further presently expects that each of Professor Engstrom and Mr. Tuft would testify that the California Rules [of Professional Conduct] apply to the conduct set forth in the Superseding Indictment." (*Id.* at 3.)

- The defendant asked certain questions of the Government in response; none concerned this point. (Dkt. No. 83-2.)

- The Government responded on November 27, 2019. (Dkt. No. 83-3.) The defendant had asked the Government to identify specific rules not listed in its initial notice, and Government noted, among others, Rule 8.5, which concerns what jurisdiction's rules apply when the Bar of the State of California disciplines a lawyer. (*Id.* at 2.)

- Later the same day, the defendant moved *in limine* to preclude expert testimony on duties or rules in any form. (Dkt. No. 82.) He did not express a concern about so-called choice of law or mention Rule 8.5. (*Id.*)

- The defendant thereafter gave notice of his own expert. (Dkt. No. 96-1.) The only rules mentioned were those of the State of California. (*Id.*)

- The Government filed its opposition to the defendant's motion *in limine* on December 13, 2019. (Dkt. No. 98.)

- The defendant filed a reply on December 15, 2019. (Dkt. No. 99.) It too did not express any concern about so-called choice of law or mention Rule 8.5. (*Id.*)

- The parties appeared before the Court on December 17, 2019. (Dkt. No. 102.) Among the subjects discussed, at some length, was the propriety and scope of expert testimony, and the adequacy of disclosures to date. (Transcript of Dec. 17, 2019 (Exhibit A), at 7-23.) The defendant again did not express any concern about so-called choice of law or mention Rule 8.5. (*Id.*)

- The Government provided supplemental expert notice on December 29, 2019. (Dkt. No. 110). In a 15-plus page letter, the Government outlined its expert's expected testimony on all relevant subjects, including Rule 8.5, and stated that its expert was of the opinion: "Assuming that Client-1 lived in California, the defendant met with Client-1 in California, the defendant communicated with Client-1 in California, and Client-1's potential claim(s) concerned conduct in and affecting Client-1 in California (or if most but not all of these things were true), the California Rules would apply to the allegations in the Superseding Indictment. Generally, where a client lives in California and meets with a lawyer in California who is licensed to practice law in California, the California Rules applies to the representation, regardless of where else, if anywhere, the lawyer takes action on behalf or to the detriment of the client. This is particularly the case where the client's matter or potential claim also concerns conduct in or affecting California." (*Id.* at 15.) The same letter noted that the "Government does not understand the defendant to disagree, as his expert notice appears to be premised on the applicability of the California Rules to the charged conduct. (*See* Dkt. No. 96-1, at 1-3.)." (*Id.* at 15 n.5.)

- The defendant responded on January 2, 2020. (Dkt. No. 113.) The defendant did not express any concern about so-called choice of law, mention Rule 8.5, or respond to the Government's statement about his expert's apparent agreement on this point. (*Id.*)

- The Government responded to the defendant's letter on January 6, 2020. (Dkt. No. 125.)

- Earlier this week, in the context of discussing the potential need for funds following the defendant's arrest, defense counsel stated that there is "only one area of expert testimony at issue that both sides have noticed. And that's on California Bar rules [and] ethics." (Transcript of Jan. 15, 2020 (Exhibit B), at 14.) Defense counsel then noted that the Court had not yet ruled on the admissibility of such testimony, to which the Court responded in pertinent part: "I've given you a preview that my inclination is that the subject matter is an appropriate one for expert testimony because the average juror is not going to be conversant with the responsibilities of attorneys under the California rules of ethics and professional

> responsibility. So that's my general view, which I think I shared with you a long time ago. And then there were some issues about whether the government's disclosure had been appropriate, and the government supplemented its disclosure, and then, you're correct, you put in a letter that's still *sub judice*, opposing the expert testimony." (*Id*. at 15.)

This record provides the Court with an ample basis to reject the defendant's latest challenge to expert testimony in this case. *Cf., e.g.*, *Centeno v. City of New York*, No. 16 Civ. 2393 (VSB), 2019 WL 1382093, at *5 n.13 (Mar. 27, 2019) ("I decline to consider Defendants' challenge to Plaintiff's experts as arguments raised for the first time in a reply memorandum are waived and need not be considered." (internal quotation marks omitted)); *see generally United States v. Yu-Leung*, 51 F.3d 1116, 1120 (2d Cir. 1991) ("To be timely, an objection must be made as soon as the ground of it is known, or reasonably should have been known to the objector." (internal quotation marks omitted; alterations incorporated)). In any event, assuming that the Court proceeds to the merits, the defendant's claim fails for multiple reasons.

First, the defendant's claim ignores the central thrust of the Government's expert's expected testimony, namely, that there are overarching duties incumbent upon all lawyers, which are neither tethered to any particular state's rules of professional responsibility nor unique to the State of California. As the Government's supplemental notice stated, these duties derive from multiple sources, and do not rest solely on the authorities of any particular jurisdiction. (*See* Dkt. No. 110, at 3-5). Indeed, they pre-date the California Rules of Professional Conduct (the "California Rules"). *See, e.g.*, *Stockton v. Ford*, 11 How. 232, 247 (1850) (cited at Dkt. No. 110, at 4).

Second, the defendant's claim assumes that, if the California Rules do not formally apply (a claim that, as discussed below, is incorrect), then they are entirely irrelevant. But as the Government has previously explained (Dkt. Nos. 98, at 4-6; Dkt. No. 125, at 2-3), the duties and rules help to demonstrate that the defendant—who is licensed and practiced in California, and both had to and did certify his compliance with continuing legal education, including with respect to ethics—acted wrongfully.[1] They also help to rebut arguments that it is apparent the defendant intends to press at trial, including asking the jury to infer that because he previously held press conferences, it was proper to threaten to do so here (*see* Def. Opp'n to Gov't MIL (Dkt. No. 109) 17). These bases for offering testimony concerning the California Rules do not turn on the degree to which they apply formally to any or all of the defendant's conduct.

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[1] As the State Bar of California states on its website, "[t]he California Rules of Professional Conduct are intended to regulate professional conduct of attorneys licensed by the State Bar through discipline. . . . The rules and any related standards adopted by the Board are binding on all attorneys licensed by the State Bar." Rules of Professional Conduct, State Bar of California, *at* https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct (last visited Jan. 17, 2020); *see also* California Rule 1.0(a) ("These rules together with any standards adopted by the Board of Trustees pursuant to these rules shall be binding upon all lawyers."); Dkt No. 163, at 1 (defendant stating, in the context of seeking to quash a subpoena to The George Washington University, that he "has consistently satisfied state ethics requirements").

Third, the defendant's claim rests on the unsupported proposition that the question of which set or sets of professional responsibility rules apply is for the Court, akin to the elements of the offenses with which the defendant is charged. (Def. Ltr. 2.) But as the Government has previously explained (Dkt. Nos. 98, at 12-13; Dkt. No. 125, at 2), testimony concerning the standards and rules of a complex profession, offered to assist a lay jury to understand the context and wrongfulness of a defendant's conduct, and to weigh properly arguments he offers, is no different from any other testimony. It is not the law that the jury will be asked to apply; it is *evidence* offered to assist the jury in applying the law.[2]

Fourth, the defendant's assertion in support of his claim that the California Rules do not apply to his conduct is wrong. At its core, as the Court is aware, the Government's theory of this case turns on the defendant's ostensible representation of a client based in California, whose representation the defendant undertook in California, and that concerned potential claims and conduct that occurred principally, if not exclusively, in California. To the extent that the defendant violated his duties with respect to his client—and, in particular, misused confidential information provided to him by that California-based client in California—it could hardly be surprising that the "'predominant effect'" (Def. Ltr. 3) of that conduct would be felt in California. Indeed, as noted above, the defendant's own expert appears to disagree with the defendant, who has not provided a supplemental notice in support of his asserted position (notwithstanding that the Government has repeatedly asked him to identify any areas of disagreement between the Government's expert and his own (*see* Dkt. No. 110, at 15-16; Dkt. No. 125, at 4-5)).

In any event, the degree to which Government's expert's opinion on this issue is persuasive to the defendant is beside the point. If the defendant disagrees with qualified opinion testimony offered at trial, the remedy is cross-examination at trial, not a pretrial hearing. The purpose of a pretrial hearing is "to ensure that the courtroom door remains closed to junk science." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002). Plainly, the opinion of Professor Engstrom (the Government's case-in-chief expert) and Mark Tuft, Esq. (the Government's rebuttal expert)—each of whom is indisputably qualified—that the California Rules apply to the conduct of lawyer admitted to the Bar of the State of California, affecting a client in the State of California, concerning claims arising in the State of California, is not "junk science."

Finally, the defendant states that certain of the California Rules do not match certain of the Model Rules or New York's rules. (Def. Ltr. 3-4.) This argument appears to rest on invented or exaggerated differences. To choose one example, the defendant states that California Rule 1.6 provides that "[a] lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(l) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule [which concerns a disclosure necessary to

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[2] As the Government has also previously explained (Dkt. No. 125, at 3), to the extent that there is any appreciable risk that the jury might misapprehend the purpose of the admission of expert testimony, the Government has no objection to an appropriate limiting instruction, were the defendant to request one, and the Government has itself proposed an instruction for the jury charge that places such testimony in context. (*See* Gov't Requests to Charge (Dkt. No. 95) 25; *see also* Gov't Letter, dated Dec. 30, 2019 (Dkt No. 111), at 12-13.)

prevent a criminal act likely to result in death of or substantial bodily harm to someone]," while "New York Rule of Professional Conduct l.6(b)(5)(i) . . . allows a lawyer to reveal confidential information in a variety of additional circumstances, including the right to 'reveal or use confidential information to the extent that the lawyer reasonably believes necessary to defend the lawyer . . . against an accusation of wrongful conduct.'" (Def. Ltr. 3.) But there is no such defense here; Nike did not "accus[e]" the defendant of "wrongful conduct" such that the defendant had to "defend" himself by using and threatening to make public Client-1's confidential information without consent.[3] And the defendant omits that New York Rule 1.6 provides, just like California Rule 1.6, that a "lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client . . . , unless . . . the client gives informed consent," or the disclosure is otherwise permitted for specified purposes, none of which applies here. To be sure, the "language" of rules in different states may "differ." (Def. Ltr. 4.) But the core prohibitions do not, much less to an extent that matters in this case.

In any event, as with the argument above, the degree to which the Government's expert's opinions are persuasive to the defendant is beside the point. If the defendant wishes to probe those opinions, the forum in which to do so is trial, not a pretrial hearing. The Government has no objection to the defendant cross-examining the Government's expert concerning the degree to which the California Rules differ from those of other, potentially relevant states. Similarly, if the defendant wishes to present admissible evidence—if any exists—that he believed that his conduct was solely governed by the rules of such a state (*see* Def. Ltr. 2), he is free do so. That is the proper manner in which to question or challenge the persuasiveness of testimony, not a pretrial hearing where a party may test out lines of cross-examination. *See, e.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) ("[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"); *Amorgianos*, 303 F.3d at 267 ("our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony"); *Ambrosini v. Labarraque*, 101 F.3d 129, 141 (D.C. Cir. 1996) (it is error to "conflate[] the questions of the admissibility of expert testimony and the weight appropriately to be accorded such testimony"); *United States v. 14.38 Acres of Land, More or Less Situated in Leflore City, State of Miss.*, 80 F.3d 1074, 1077 (5th Cir. 1996) ("[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration"); *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) ("Disputes as to the strength of [an expert's] credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.").

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[3] To the extent that the defendant suggests (Def. Ltr. 3 & n.3) that it was permissible under the New York rules for him subsequently to publicly disclose, via Twitter and against the explicitly communicated desire of his client, his client's confidential information (including documents that expressly had been marked privileged and confidential), the defendant offers no plausible basis to find that it was reasonable to believe the such public disclosure was "necessary" to any defense of the defendant, as required under the New York rules. In any event, even if the defendant were correct, that is a potential basis to cross-examine the Government's expert at trial, not a basis to demand to do so before trial.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: s/ Daniel C. Richenthal
Matthew D. Podolsky
Daniel C. Richenthal
Robert B. Sobelman
Assistant United States Attorneys
(212) 637-1947/2109/2616

Enclosures

cc: (by ECF)

Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 19 Cr. 373 (PGG)

MICHAEL AVENATTI,

Defendant.

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New York, N.Y.
December 17, 2019
12:30 p.m.

Before:

HON. PAUL G. GARDEPHE
District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
BY: MATTHEW PODOLSKY
ROBERT SOBELMAN
DANIEL RICHENTHAL
Assistant United States Attorneys

SCOTT SREBNICK
E. DANYA PERRY
JOSE QUINON (via phone)
Attorneys for Defendant

(In open court)

(Case called)

MR. PODOLSKY: Good afternoon, your Honor. Matthew Podolsky, Robert Sobelman and Daniel Richenthal for the government.

MR. SREBNICK: Good afternoon, your Honor. Scott Srebnick on behalf of Michael Avenatti who is present before the court. Also with me at counsel table is E. Danya Perry who has joined the defense. And on the line is Mr. Jose Quinon.

THE COURT: All right. The first order of business is to arraign Mr. Avenatti on the superseding indictment.

Mr. Avenatti, you are here this afternoon with Mr. Srebnick and Ms. Perry as your attorneys; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Have you received a copy of the superseding indictment which reflects the charges against you?

THE DEFENDANT: I have, your Honor.

THE COURT: And have you read the superseding indictment?

THE DEFENDANT: I have.

THE COURT: And have you discussed it with your attorney?

THE DEFENDANT: Yes, I have.

THE COURT: You should understand that you are charged in Count One with transmitting interstate communications with

intent to extort. In Count Two you are charged with committing extortion. In Count Three you are charged with honest services wire fraud. You understand those are the charges against you in the superseding indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish me to read the superseding indictment to you now here in open court?

THE DEFENDANT: No.

THE COURT: With respect to Count One of the superseding indictment, how do you plead, guilty or not guilty?

THE DEFENDANT: Not guilty, your Honor.

THE COURT: As to Count Two, how do you plead, guilty or not guilty?

THE DEFENDANT: Not guilty.

THE COURT: As to Count Three, guilty or not guilty?

THE DEFENDANT: Not guilty, your Honor.

THE COURT: You may be seated.

The parties have previously given me an estimate of one week for trial. Is that still viewed as a reliable estimate?

MR. PODOLSKY: Your Honor, I think that is a reliable estimate as to the government's case in chief, again starting at whenever we complete jury selection, but I believe that is still accurate as to the government's case.

THE COURT: All right. Mr. Srebnick, do you have any

thoughts?

MR. SREBNICK: That seems accurate to me. If we're starting on a Tuesday, I would anticipate the entire case would be completed by the end of the following week.

THE COURT: OK. I am going to talk to you a minute about how I intend to pick the jury.

I am going to use a jury questionnaire. The primary purpose of the questionnaire will be to elicit information from panel members about exposure to press accounts and other material concerning Mr. Avenatti concerning this case, other cases in which Mr. Avenatti is involved, to determine whether the panel members can set aside that material in considering the evidence in this case. Given how much press there has been about Mr. Avenatti, it appears obvious to me that a questionnaire is necessary.

The process will be as follows: I'm going to arrange for a panel of 120. They will be summoned for Tuesday morning, January 21. I will give them a very brief introduction about the case, and then they will receive the questionnaire and complete it and leave for the day.

We will copy the completed questionnaires and distribute them to the lawyers. We will reconvene at about 2 o'clock that afternoon to discuss the completed questionnaires, and attempt to reach a consensus on which jurors should be excused based on their answers to the questionnaire.

We will resume the voir dire on Wednesday morning. We will address any lingering issues regarding panel members, answers on the questionnaires. We will then conduct a regular voir dire. Accordingly, the questionnaire will be very focused on the matters that are identified: Prior exposure to the press or otherwise to Mr. Avenatti, any knowledge about the case, knowledge about other cases Mr. Avenatti is involved in, etcetera. The standard voir dire matters will be addressed on Wednesday during the standard voir dire.

I have seen a filing in which the government objects to a number of the defendants' proposed questions for the questionnaire. The government suggested that the two sides should confer about the content of the questionnaire and make a joint submission concerning the areas of agreement as well as any areas of disagreement. That makes sense to me. Accordingly, the parties are directed to so confer and to make a submission by Monday, December 23, concerning the jury questionnaire, what they agree on, what they don't agree on.

We will be selecting 12 jurors and three alternates. The defendant will have ten peremptory challenges, and the government will have six. Peremptory challenges will be exercised simultaneously. After I have qualified the panel members, they will be excused for about 15 minutes or so. I will then hear any challenges for cause. The parties will then prepare lists of panel members against whom they wish to

exercise peremptory challenges. Those lists will be submitted to the Court simultaneously. We will then agree on who are the 12 lowest numbered jurors who survived that process. We will then proceed to the selection of alternates. Each side will have two peremptory challenges as to alternates. The parties will prepare a list of the two panel members against whom they wish to exercise peremptory challenges. Those lists will also be submitted simultaneously. The next three lowest numbered panel members who survive that process will be the alternates.

I'm not entirely sure what courtroom we will be in; it will not be my courtroom; it will not be this courtroom. My hope is it will be one of the oversized courtrooms in this building, which are the first, third and fifth floor.

Any questions about the jury questionnaire or the process for jury selection before I move on?

MR. PODOLSKY: Not from the government, your Honor.

MR. QUINON: Yes, your Honor. This is Jose Quinon for the record. Your Honor, since we're not familiar with the manner that you select the jurors, can you go over again the part that we submit challenges simultaneously? Again, how does that process go?

THE COURT: Sure. So, I will conduct the traditional voir dire, and once we have completed that process I will excuse the panel members for 15 or 20 minutes, and then you and Ms. Perry and Mr. Srebnick will consult about what panel

members you want to exercise your ten peremptory challenges against, and the government will do the same. In the case of defense they will prepare a list of as many as ten panel members against whom the defendant wishes to exercise a peremptory challenge. The government will prepare a similar list of as many as six panel members it wishes to exercise peremptory challenges against. The two lists will be submitted simultaneously to me. I will then read the list to the lawyers. By panel number I will read the list of who each side has excused. We will then announce the 12 lowest numbered jurors who survive the exercise of peremptory challenges. They will make up the jury.

MR. QUINON: OK.

THE COURT: Any other questions, Mr. Quinon?

MR. QUINON: No, sir. That clears it up. Thank you, sir.

THE COURT: OK. Let me turn to the matter of expert discovery and testimony.

The government has indicated that it wishes to present expert testimony concerning legal ethics and professional responsibility. They gave notice to the defendant back in November of that.

The superseding indictment alleges that Mr. Avenatti violated his professional obligations as an attorney, his obligations to his client, by seeking to extract a 15 to $20

million payment from Nike for himself to the detriment of his client's interest and without the client's knowledge. The government seeks to rely on proof regarding legal ethics and professional responsibility in particular for purposes of demonstrating that Mr. Avenatti committed honest services wire fraud, which is Count Three of the superseding indictment.

In the government's November 22, 2019 letter it says that it wants to call or that it may call two experts in California professional responsibility and legal ethics. The first person is Nora Engstrom, who is a professor at Stanford Law School, and the second person is Mark Tuft, who is a partner in a San Francisco law firm.

Professor Engstrom has published in the area of legal ethics, and Mr. Tuft's primary area of practice is in the area of professional responsibility and legal malpractice. Mr. Tuft has coauthored a California Practice Guide on Professional Responsibility. He is a certified specialist in legal malpractice, and is former president of Association of Professional Responsibility Lawyers.

In its November 22, 2019 letter the government informs defense counsel that it expects the expert witnesses "would testify that at all times relevant to the charges in this case the state of California imposed a number of legal duties, ethical rules and professional responsibility requirements on lawyers, including duties of confidentiality, loyalty, honesty,

fair dealing and reasonable communications with respect to all clients, and that certain of these same duties also apply with respect to individuals conferring with a lawyer regarding potential legal claims and retaining the lawyer." Citing the government's November 22, 2019 letter, docket number 83-1 at page 2.

The government goes on to state in its letter that it wants to elicit from these expert witnesses that, assuming the truth of the allegations in the superseding indictment, Mr. Avenatti violated a number of California Rules of Professional Responsibility.

Mr. Avenatti has moved to exclude the proposed expert testimony under Federal Rule of Evidence 702, 704 and 403. He also complains that the government's notice under Federal Criminal Procedure 16(a)(1)(G) is deficient, citing the defendant's brief, docket number 82 at pages 9 through 13.

Mr. Avenatti's primary complaint, it appears to me, is that the proposed expert testimony usurps the role of the jury in applying the law to the facts. Id. at pages 10 to 11. Mr. Avenatti also seeks a Daubert hearing that would address the methodology and reliability of the experts' opinions. Id. at pages 9 through 13.

I'm going to give you now my views as to what I've read so far.

First, both sides appear to agree that for purposes of

the honest services wire fraud count the government must prove that Mr. Avenatti breached a duty that he owed to his client. See, e.g, defendant's brief, docket number 82 at page 8.

Accordingly, it appears to me that areas of inquiry identified by the government in its November 22, 2019 letter, including the professional obligations and duties of lawyers, the ethical rules that govern the practice of law, professional responsibility requirements that apply to lawyers, including the duties of confidentiality, loyalty, honesty and fair dealing, the duty to reasonably communicate with clients, and the fact that certain of these duties apply to individuals who are conferring with a lawyer for purposes of determining whether they will retain a lawyer, it does seem to me that these matters are relevant to the case. It also strikes me that these matters are beyond the ken of the average juror and thus are an appropriate subject for expert testimony.

Accordingly, I am inclined to permit testimony by one expert concerning relevant rules of California professional responsibility as they apply in these areas of the duty of confidentiality, loyalty, honesty and fair dealing, etcetera.

It is highly unlikely that I will permit two experts to testify about these matters, because ultimately the trial is not an attorney grievance proceeding; it's about whether the government can prove beyond a reasonable doubt that Mr. Avenatti violated certain federal criminal statutes. So, while

I believe that testimony on these points that I've cited is relevant, I'm not going to allow it to take over the trial.

The government also wishes to elicit opinions from these experts about whether -- assuming the allegations in the superseding indictment are proven true -- Mr. Avenatti violated one or more rules of California professional responsibility.

It is highly unlikely that I will permit such testimony. I do believe that the proposed opinions would usurp the jury's function. It's up to the jury whether Mr. Avenatti violated one or more rules of California professional responsibility, and if so whether the government has proven beyond a reasonable doubt all of the elements of honest services wire fraud. I would not be inclined to permit an expert to opine on whether the government's allegations in the superseding indictment -- assuming that they are true -- make out violations of California's rules of professional responsibility. I believe that permitting such an approach presents a significant risk of jury confusion.

I will, of course, be instructing the jury that the allegations in the superseding indictment are proof of nothing. That is a standard instruction. Permitting witnesses to assume the truth of the allegations in the superseding indictment, and then offering opinions based on their assumptions, runs counter to that instruction as well as other instructions I will give regarding, for example, the presumption of innocence.

Accordingly, it is highly likely that I will preclude the proposed opinions on these matters as more prejudicial than probative under Federal Rule of Evidence 403.

Accordingly, it is my present inclination to permit expert testimony generally about the duties and obligations of lawyers, vis-a-vis their clients, under the California rules of professional responsibility, but it is my intention to leave it up to the jury to conclude whether Mr. Avenatti violated his obligations under those rules of professional responsibility.

Now, Mr. Srebnick, assuming I was to rule consistent with what I just said, do you have any continuing concerns about the proposed expert testimony?

MR. SREBNICK: I do, your Honor, in the following sense. I understand that the Court -- essentially it's a bifurcated situation. The first is are the rules themselves relevant, and can an expert testify about the rules. And I understand the Court to be saying yes. And on the second issue, whether they were violated, no.

But on the first issue, is it the Court's intention to allow the experts to merely testify that the rules exist and then the government would offer the rules in evidence? Or would the experts be permitted to actually interpret the rules and answer hypotheticals about the rules, and things of that nature? Because if that's the case, then, you know, I have a more strident objection than if it were simply allowing the

experts to say the rules exist, California lawyers are bound by them and then the government offers the relevant rules in evidence.

THE COURT: What are the government's intentions with respect to this first category that we are been talking about?

MR. PODOLSKY: Yes, your Honor. And then I'm happy to also follow up on some other comments the Court made.

But just directing to that question, we certainly haven't written our examination of the proposed experts at this time, so it's a little bit difficult for me to say with absolute certainty what we would elicit. With that said, we certainly do imagine that the testimony would go beyond simply offering into evidence a document that describes the rules.

First of all, as your Honor alluded to, the duties of a lawyer really are beyond the ken of an average juror, and it's not sufficiently helpful and will not sufficiently assist the trier of fact to simply read to them or put on a screen the written rules of the state bar of California.

In addition, as the notice makes clear, there is testimony that is relevant to the jury that goes to understanding what the duties owed to a client are, for example, duties of loyalty, honesty and fair dealing. Many of those are captured in the practical rules that are written down and apply to lawyers in California, but some of those go beyond what is actually on the page, and so the government's intention

would be to have one of the experts testify as to what those duties mean, generally how they operate. Whether we would elicit hypothetical questions or intend to it's a little bit too early to tell. I will note that the court in the Second Circuit in Bilzerian permitted such questioning, provided it's not simply a repetition of the allegations in the indictment.

So, we think it's certainly proper, but I can't say sitting here today what the precise contours of our questions would be, but it would go beyond simply offering into evidence the rules and saying that they exist.

MR. SREBNICK: So, to be clear, we do object to that. I think in Bilzerian what happened, my recollection, is that professor Coffey was given a copy of a blank form, a disclosure form, a 13(d) form, not the one signed by Mr. Bilzerian but just a blank form and was allowed to tell the jury what the form actually requires.

I think this is an area that's really fraught with serious danger to go down this road, because if the expert starts interpreting the rules and the Court determines that the interpretation of the rules -- which is really just a question of judicial interpretation, because these rules are interpreted by courts -- if the Court determines that the expert has interpreted the rules incorrectly, then the Court would be in a position of having to instruct the jury differently than what the expert has testified to.

So, once the expert goes beyond simply saying that this is what the rules are, it becomes very, very dangerous that we will end up getting competing views of the law among the different experts. And that's what essentially motivated Judge Caproni in the Jaffe case to not allow that type of testimony, because she didn't want that case to turn into a mini trial about different competing interpretations of the rules.

And let me give you an example. The expert can testify for the government and testify that, well, a lawyer has a duty of confidentiality and has to hold client confidences secret. OK, as a general proposition we all agree with that; that's not controversial at all. But the question of whether or not the duty of confidentiality was violated in this case -- which I guess is maybe not an ultimate issue but it's a sub issue that the jury will be apparently considering --

THE COURT: I have already told you that my inclination is to not permit an expert to offer an opinion about whether Mr. Avenatti violated a particular rule of professional responsibility, so it sounds like you're headed towards that. I have already told you what my inclination is on that, so I'm not sure that extended discussion on that point is really helpful to me.

MR. SREBNICK: I understand.

THE COURT: So, what I want us to stay focused on is

my inclination is that it is relevant for the jury to learn what the relevant rules of professional responsibility are in California, and nobody has given me the rules that it's expected will be introduced at trial, so I'm not sure exactly how clear they are. It may be that they are very clear. I don't know. It also may be that some would benefit from extrapolation. I don't know because again I don't know what the specific rules are.

But the point is that it does seem to me that these rules have some relevance here because the government is going to have to show that Mr. Avenatti breached a duty. So, it does seem to me that the rules are -- there are rules of professional responsibility that are relevant here. It does seem to me that those rules are, as I said, beyond the ken of the average juror and so, therefore, they are appropriate subject matter for expert testimony.

It seems that you generally agree with that but you're concerned that the expert may interpret the rules and go beyond that presentation of what the rules actually are.

MR. SREBNICK: Well, actually I don't agree on the relevance because of the following reasons. Skilling made it clear that the only fiduciary duty that's relevant in an honest services fraud case is the duty not to engage in bribery or kickbacks. Duties about self dealing, confidentiality, consultation, communication, are not what Skilling was talking

about when it talked about a paradigmatic case of bribery or kickbacks. So, just to be clear, my position is that the rules are not relevant at all, but to the extent the Court has overruled that --

THE COURT: Well, I haven't ruled on anything. We're having a discussion here. I want to be very clear my purpose is to tell you my reactions to what I've read and then give you an opportunity to respond to it.

MR. SREBNICK: Fair enough.

THE COURT: That's what we're doing here. And I have a number of issues that we're going to discuss today, and this is one of them, and this is your opportunity to say what you want to say, and if you want to follow it up with a written submission obviously you're welcome to do that.

But what I've told you so far about the area of expert testimony -- and we're going to be talking about the honest services fraud claim in just a minute -- but what I have told you with respect to the proposed expert testimony is that it does seem to me that the case presents an issue about whether Mr. Avenatti breached the duties he owes to clients -- or to one particular client -- and that the government is going to be required to prove that. And in that context it seemed to me that rules of professional responsibility that go to these issues, that they're relevant. I understand you disagree -- and again it's because of your views on the honest services

wire fraud claim, which we'll get into in just a minute.

But what I'm trying to do here is to find out, you know, more specifically what your remaining objections are, because I interpreted your papers as primarily concerned about the experts testifying about essentially whether an element of the offense had been satisfied here or not. And your argument was this usurped the role of the jury, etcetera, and I had some sympathy with that position. But now what I'm trying to find out from you is what else you really care about with respect to the expert.

MR. SREBNICK: Yes. Thank you, Judge. And what I care about is how on that first issue how the rules apply, how that's actually going to come in. And I hear the government saying as of now it hasn't yet formulated its questions, and so what I would I guess suggest or request to the Court -- because the Court is under Kumho Tire not just the gatekeeper on reliability but the gatekeeper on relevance, both, and can fashion a mechanism not bound by any particular factors under Daubert but can actually on its own decide how it can assess relevance and reliability, to hear from the expert and understand from the government exactly what it's going to do just because of the nature of the testimony and how perilous it can be in a case like this. So, that would be my request to the Court.

THE COURT: OK. Given what's been said, I need more

specificity about what the expert is going to say. You gave a general description of Mr. Srebnick has concerns about it, and so I'm going to need more detail about what he or she is actually going to say. And so you can think of it in terms of an expert report. And that would be a summary of the opinion he or she is going to offer that go beyond the simple presentation of what the rules are.

When can you get me that?

MR. PODOLSKY: Just one moment, your Honor.

I'm just trying to factor in the holidays here. I would ask for a week but I realize we have additional briefing due I believe a week from today followed by the holiday. And frankly, your Honor, I don't know our witnesses' availability to confer during the holidays. I think we would ask for at least the end of next week so that we can make sure that we have time with them but, of course, we want to do it on a schedule that's useful to the Court.

THE COURT: I'd like it from you in a week's time, because Mr. Srebnick is going to have to respond to it.

MR. PODOLSKY: OK, very well.

THE COURT: So that would mean that you would submit to me a more detailed description of what you expect the testimony would be in greater detail than the summary you previously provided, such that Mr. Srebnick has a better understanding of exactly what will be elicited and so that he

can present any continuing concerns that he has to me and I can rule on the issue.

MR. PODOLSKY: That's fine, your Honor. What I am envisioning -- and please let me know if that's consistent with what you have in mind -- is essentially a letter from the government that spells out in greater length precisely the areas of inquiry. We certainly don't plan to submit questions but something that gives additional focus on each area that we intend to inquire as to the expert.

THE COURT: Right. I think, you know, Mr. Srebnick has given you some sense of what his concerns are. He's concerned about questions that go beyond the mere language of the rules and may call for interpretation, and he is worried about hypothetical questions. So, I want your response to be sufficiently detailed that it will put him on notice of those areas that he has expressed discomfort about, and then he can make whatever arguments he wants, and then I can rule on the issue.

And, so, in trying to figure out how detailed it would be, what I would say to you is make it detailed enough so that I don't have to do an ex parte examination of the expert to figure out what he or she is going to say. Make it detailed enough so that's not going to be necessary.

MR. PODOLSKY: Very well, your Honor. We will endeavor to give a sufficient amount of detail so that the

Court can consider any objections ahead of trial.

I will note, of course, that to the extent the defense just disagrees with the opinion offered by the expert, they are entitled to cross-examine and to call their own expert, which they have noticed at this time. But certainly we will endeavor to provide sufficient detail for the Court to assess the areas of testimony and what the Court will permit.

THE COURT: They have identified a rebuttal expert, and they've made disclosures of the opinions that they seek to elicit. Do you have any complaints or concerns about the disclosure that's been made with respect to the rebuttal expert?

MR. PODOLSKY: Your Honor, in the following respect. First of all, we understand that your ruling with respect to opining on the conduct -- or I suppose the defense's version of the defendant's conduct -- would similarly be off limits.

We would also frankly request the same that Mr. Srebnick has just requested, some further report so we can understand what the subjects that he would intend to inquire as to his expert witness so that we could make similar objections, especially as to whether the expert is going to say anything other than "read the rules" if he calls a rebuttal expert.

THE COURT: Well, I'm looking at Mr. Srebnick's disclosure of the rebuttal expert, and I mean he does give -- first of all, he lists -- he doesn't represent it as

exhaustive, but he does list the particular rules of professional conduct that he expects his witness would testify about.

MR. PODOLSKY: Your Honor, just to make one note, I believe we did as well. In fact, we listed several in our initial disclosure. The defense requested clarity as to whether there were others, and then we followed up with a supplemental notice listing I believe just a couple of extra rules.

THE COURT: But he goes through them one by one, and there is a little explanatory paragraph under each designation, you know, Rule 1.2, Rule 1.4, etcetera, etcetera, and he talks about what the rule says, and he gives a little squib on what the witness would say about the rule, and I think this actually gives me more detail than you gave me -- or gave him, I should say.

MR. PODOLSKY: Your Honor, if that's what you have in mind, for us to supplement our report or letter next week, we can certainly provide that, that type of information without a problem.

THE COURT: OK. And if you intend to present hypothetical questions to the witness that go to the issues in this case or go to the alleged conduct in this case, if you seek to do that, that should be part of your letter as well, because Mr. Srebnick has expressed concerns about that, and I

have indicated that I am troubled by the notion that the expert witness would in essence apply the rules to the conduct that's alleged in the indictment and then make pronouncements about whether Mr. Avenatti did or did not violate particular rules. I am concerned about that and, obviously, depending on the hypothetical, they could essentially be the equivalent.

So, if you do have aspirations in that regard, please let me know, and let Mr. Srebnick know, and he can make whatever arguments he wishes, and I will rule on the subject.

MR. PODOLSKY: That's fine. And we will provide additional clarity on that. I am comfortable saying now that although we thought our position asking about the allegation of the indictment was legally permissible, given what your Honor said this morning, to the extent we're asking hypotheticals, I do not believe we would ask hypotheticals that go to the specific conduct alleged in this case. We understand your Honor's view on that, and we certainly wouldn't try to sub rosa bring in the allegations in the indictment simply by couching them as not including the defendant's name. But to the extent we can provide additional clarity in our letter, we will.

THE COURT: OK. Thank you.

Mr. Srebnick, anything else you want to say about the expert witness issue before we move on?

MR. SREBNICK: No, your Honor.

THE COURT: OK. So, as the parties know, Mr. Avenatti

has moved to dismiss Count Three, which is the honest services wire fraud count, and I wanted to have some discussion about the defendant's arguments today.

So, the background is that after the Skilling case it is clear that an honest services fraud charge brought under 18 U.S.C. Section 1346 is limited to schemes that involve bribes or kickbacks. Citing Skilling 130 S.Ct. at 2931.

I further understand an honest services fraud charge under Section 1346 to require proof of the following: First, a scheme or artifice to defraud; second, that the scheme was for the purpose of depriving another of the intangible right to honest services; third, that the misrepresentation or omission was material; and, fourth, that in this case the wires were used in furtherance of the scheme. Citing United States v. Rybicki, 354 F.3d 124, 145-46 (2d Cir. 2003 (en banc).

Here, Count Three of the superseding indictment alleges that Mr. Avenatti solicited payments from Nike, in violation of the duty of honest services he owed his client and without the client's knowledge. Other paragraphs of the superseding indictment made clear that the government is claiming that Mr. Avenatti told Nike that he and his client would not take certain action -- for example, publicizing alleged misconduct by Nike employees -- if Nike agreed to pay 15 to $20 million to Mr. Avenatti. And the government further alleges that Mr. Avenatti made these representations without

his client's knowledge or consent.

Now, Mr. Avenatti points out in his motion that the word "bribe" or "kick-back" doesn't appear in a superseding indictment. The government refers to payment. And it is also true that the bribe theory is different than the extortion theory that's set forth in Counts One and Two, and it's also true that most of the allegations in what is a speaking indictment appear to relate to an extortion, but the question is whether that simply means that the honest services fraud charge is an additional theory of liability.

And, Mr. Srebnick, I want to understand again sort of what your principal problem with the charge is. There is a number of ideas that are floating through your papers. One idea is that it seems to me that the government has presented this as an extortion case, and now it has introduced this idea of bribery in it, and that somehow it shouldn't be permitted to do that because, first, the word bribe doesn't appear in the indictment, and then, secondly, it's inconsistent with the extortion theory that we have been proceeding with up to the filing of this superseding indictment.

So, tell me what you want to say about the honest services fraud charge in addition to what you have told me in your papers.

MR. SREBNICK: Yes, your Honor. So, first on the last point about inconsistency. So for years legal scholars have

debated are the crimes of extortion and bribery mutually exclusive. Right? And I know I didn't highlight that in my papers, but just sort of as a background that's been a debate that's gone on for years. And the way the courts have sort of come out on it is when somebody is charged with extortion under color of official right -- obviously a public official -- that concept is not mutually exclusive with bribery because there is not necessarily any kind of overt fear or threat of force or anything of that nature.

There is an open question actually under the law about when the theory of extortion is one of fear that Mr. Avenatti is, according to the government, threatening Nike and striking fear in their hearts, that that whole theory is inconsistent with the idea that he is soliciting a bribe from them at the same time that he is trying to scare them into paying him.

THE COURT: Now, let's assume it is inconsistent. Why is that a problem? I mean let's accept your argument that extortion is inconsistent with bribery, so we will accept that. Tell me why it's a problem for the government to allege an alternative theory, in other words, well, members of the jury, if you conclude that there was an extortion here, there was no threat, etcetera, etcetera, then we argue to you that Mr. Avenatti was soliciting a bribe from Nike in exchange for him violating the duty of honest services he owed his client. Why would that be a problem?

MR. SREBNICK: The truth is I don't know the answer to the question about whether or not the government -- certainly the government can plead, for example, lesser included offenses or offenses that may not be entirely consistent with one count and the other. But to charge a theory that on its face is mutually exclusive with another theory in the same indictment, I just have never encountered that in any case I have ever handled.

I know that there is case law out there -- and I think there is a case out of the First Circuit called Kattar. It's at 840 F.2d. I don't remember the case cite, but I think it stands for the proposition that in separate cases the government can't adopt two different theories because there is a due process issue.

And I would wonder whether or not we would be entitled to a severance of the counts if the government can go to a jury on two theories that are just completely inconsistent with each other, assuming that that's the case under the law, which is, you know, I think the courts are still sort of debating that issue.

But, you know, you've got to read an indictment with common sense, and the government's whole theory in this case was Avenatti was shaking down Nike, and now in order to fit it into some honest services theory they have morphed into the idea that this is some solicitation of a bribe.

Now, we all sort of know what a bribe is when we see it. We know what a kickback is, and I think that this is a very tortured way of trying to identify some quid pro quo that simply doesn't exist. I mean I had to ask the government for more particulars. What is exactly the quid pro quo in this case?

So when the Supreme Court in Skilling reversed the conviction and found that the honest services fraud was vague, the statute, unless it was limited to simply paradigmatic offenses of bribery and kickbacks, what it was saying is that the defendant really has to know when he is doing something that he is engaged in some kind of illegal quid pro quo, some illegal type of bribery or kickback arrangement. And it's just hard from this indictment to really know what exactly that bribery scheme actually was.

You know, most cases that have dealt with 1346 historically have dealt with public sector types of cases. Skilling was a private sector case, but in a public sector case you can actually look to a bribery statute, 201 or 666, and you can define by statute, well, it has to be, for example, money in exchange for an official act. We know McDonnell held that it had to be limited to an official act. And there is actually elements of a bribery statute that you can look to to determine whether a defendant's conduct meets the elements of bribery or meets the elements of kickback. But in the private sector if

you were to take the honest services element out of this case entirely and ask could Nike or Mr. Avenatti be charged with solicitation of a bribe, under what statute, under what federal statute or state statute would this constitute bribery? And I just haven't been able to find one.

And I think what that does, Judge, is it highlights the vagueness of this count, whereas, you know, when you read the count and you read the indictment and you apply a common sense analysis of it, it's not easy to identify what is the actual bribe, kickback, what is the quid pro quo. And if you have to strain to find it, I think it tells you something about the vagueness of the charge and the fact that it shouldn't stand.

THE COURT: Well, the government has added some language in the superseding indictment about Mr. Avenatti allegedly not informing his client of the demands he was making on Nike. The government argues that he had a duty to disclose to his client these demands that he was making. The government says he didn't do it. And the government says that he made certain representations to Nike about actions that he and the client would not take in the event that Nike agreed to pay him 15 to $20 million. And the government says, as I understand it -- and I'm going to give them an opportunity in a moment to explain the bribery theory -- but as I understand it, at this stage the government alleges that Mr. Avenatti essentially said

to Nike that he and a client would not make public alleged misconduct by Nike employees if Nike agreed to pay Mr. Avenatti 15 to $20 million. So, as I understand it, the government is claiming that that was a solicitation of a bribe, that is, that Mr. Avenatti, in detriment to his client, and without the client's knowledge, agreed not to take certain actions which could be taken if he received this payment. That's what I understand the bribery theory to be. But rather than my speculating, why don't I ask the assistant to lay out what the government's bribery theory is.

MR. PODOLSKY: Yes, your Honor. I think you understand it. Let me just add an additional fact or observation, which is, as I believe is clear, and certainly alleged in the superseding indictment, Mr. Avenatti also explained that he would settle his client's claim if he was paid a bribe, a side payment, and that he would not settle that claim if he were not paid.

Now, Mr. Srebnick wants to basically eliminate the crime of honest services fraud by saying that you can only have this crime if it is also covered by a bribery statute. But this isn't 666, this isn't 201, this is wire fraud, and it's an instance where a lawyer defrauded his client to whom he owes a duty of honest services of those honest services. The way he did that is by demanding a payment in exchange for action taken with respect to the client.

Now, Mr. Srebnick keeps wanting to focus on the word bribe and input all sorts of meanings on bribe, so that bribe can only be interpreted as something that a public official takes and, therefore, there is no honest services unless there is a bribe in the public official sort of vein. But that's not what honest services fraud is. And we can go back to where your Honor started, which is with the elements of honest services wire fraud, and what the classic explanation of what needs to be proved is -- and this is contained in the government's request to charge -- is that the government needs to prove a quid pro quo. They need to prove a solicitation or a demand of money in exchange for action, in violation of the fiduciary duty owed in the private area to an employer or here to a client. And that's exactly what we have. That's exactly what we have alleged, that Mr. Avenatti demanded payment, and in exchange for that payment he would keep confidential and not expose certain conduct of which his client potentially had relevant facts, and he would agree to settle his client's claims in exchange for those payments. I mean that is exactly what honest services fraud gets at both when a defendant is a public official and when a defendant is engaged in an honest services fraud in the private sector.

So, I hope that provides some additional clarity, but you asked Mr. Srebnick towards the beginning whether if there is any inconsistency whether that's a problem. We don't think

it's a problem. But I really want to focus back on the premise of that question, which is there is no inconsistency in the charges here whatsoever. Mr. Avenatti used client information to make demands of Nike of money to which he was not entitled wrongfully, and that's an extortion. He also defrauded his client of his right to Mr. Avenatti's honest services, and he did that by demanding that Nike pay him in exchange for taking action or not taking action with respect to his client, not disclosing that to his client. And that is a classic honest service fraud.

So, I just want to emphasize that there is no inconsistency. It just turns out that Mr. Avenatti in the course of his conduct attempted to victimize both Nike and his client, and we anticipate that we will prove that up at trial in January.

THE COURT: All right. Mr. Srebnick, anything else you want to say about this charge?

MR. SREBNICK: Yes. One last point on the issue of the confidential information. So I think we can agree that under Skilling even for 1346 a quid pro quo is required. And the government's theory is that Mr. Avenatti was demanding a payment in exchange for doing nothing, not releasing confidential information.

The client, according to the government's theory, didn't want the confidential information disclosed, so the

so-called quid pro quo is you give me money and I do nothing. That's not a quid pro quo, and so there has to be some other theory. So, as I understand --

THE COURT: Well, but isn't their theory that Mr. Avenatti said to Nike I will settle the client's claim for I think it was a million and a half dollars but only if you agree to pay me 15 to $20 million. If you don't agree to pay me 15 to $20 million, then there is not going to be a settlement of the client's claim.

MR. SREBNICK: I disagree with that just because the government's own indictment says that at the end Mr. Avenatti proposed a settlement of $22 to 22 and a half million to settle all of the claims.

But beyond that, I just think again back to the issue of common sense. Is their theory -- and if that's their theory, then that's the theory they should have to go to the jury with -- that Mr. Avenatti said I won't let you settle for a million and a half with the client unless you pay me $15 million? You can pay me 15 and the client one and a half. For the right to settle for one and a half you have to pay me 15? If that's the theory that they're going with to the jury -- and still don't think it makes it out in the indictment under Count Three -- I would like them to be married to that theory, that that is their theory, and I'm entitled to know if that's the bribe we're talking about.

THE COURT: Well, it's combined with the agreement not to disclose the alleged misconduct, right?

MR. SREBNICK: But there is no -- that's a promise to do nothing. There is no presumption that it's going to be disclosed. According to the government's theory, he actually has a duty of confidentiality not to disclose it. That's their theory. So the quid pro quo is you pay me this, and the quo is I do nothing? That just is not a paradigmatic case of bribery or kickbacks, which I think is required under Skilling.

I think the Court is obviously familiar with the issues, and unless your Honor has any other questions.

THE COURT: Does the government want to respond to that last point Mr. Srebnick made?

MR. PODOLSKY: Your Honor, it seems to me that the Court certainly understands the theory. I will observe that it doesn't make something not bribery if what you are paying someone to do is not to take an action, to not hire somebody else or anything like that. The question is whether you are making a decision or taking an action with respect to the person to whom you owe the duty of honest services.

And Mr. Srebnick is welcome to argue to the jury that the government hasn't proved the elements because we haven't proven the defendant's intent to defraud his client of his honest services, and the jury can decide. But it's clear that the government has properly alleged in Count Three a violation

of the wire fraud statute, and we are entitled to go to the jury on it.

THE COURT: All right. So I want to turn to the government's motion in limine. The government has moved to exclude many different categories of evidence. The time for the defendant to respond hasn't been set yet, I don't think, but I wanted to just run through with you, Mr. Srebnick, these various categories and find out whether we actually have a genuine dispute.

So, these are laid out in the government's motion in limine, which is docket number 96. Do you have that list in front of you, Mr. Srebnick?

MR. SREBNICK: I do, your Honor.

THE COURT: OK. The first category is evidence that the charges were politically motivated. And this goes to the vindictive prosecution motion that you have made, which is still pending.

But let me ask you this. If I were to reject your arguments that the indictment should be dismissed for vindictive prosecution, would you agree that evidence regarding that would be irrelevant?

MR. SREBNICK: Yes. May I qualify that? And I'm going to be filing something in writing, so I don't want anything I say here -- but based on research and the law, if I can just have the Court's patience.

THE COURT: Yes. This is a practical enterprise we're engaged in here.

MR. SREBNICK: And it's a nuanced issue, and that's why I need to address it, so let me give the Court an example with respect to number one.

THE COURT: OK.

MR. SREBNICK: Certainly we would not argue to the jury that any of the prosecutors here were politically motivated against Mr. Avenatti, or Geoffrey Berman, and that's why the case was brought. I understand that the law is clear on that, and it was in that context that I was answering the Court's question for purposes of trial. But let me give the Court an example where I think it might be relevant, and this is why I'm saying it's nuanced.

The Nike lawyers who were engaged in the negotiations with Mr. Avenatti beginning on March 19, on the 19th decided -- knowing that Nike was itself under investigation -- went to the U.S. Attorney's office to report Mr. Avenatti. I think it's relevant their motivations, the Nike lawyers' motivations -- and I'm going to address this in writing -- as to why they decided to go to the U.S. Attorney's office knowing that Mr. Avenatti was a high profile individual, knowing that it might get a little bit more traction at the U.S. Attorney's office, that they could possibly entice the U.S. Attorney's office to be interested in a civil or what we believe was a civil

settlement dispute where it's unprecedented that this type of case gets prosecuted; and I think we would be able to question the Nike lawyers about their motivations and their understanding of who Mr. Avenatti was when they decided to go to the U.S. Attorney's office. So, that's why I say it's somewhat nuanced. We wouldn't argue that these gentlemen at the table, you know, were politically motivated.

THE COURT: Let me just give you my gut reaction. My gut reaction is I'm not sure why it's relevant what the Nike lawyers thought. I'm not sure why we care why the Nike lawyers did what they did.

You seem to be saying that it's important for the jury to understand that the Nike lawyers decided to take this to the U.S. Attorney's office because Mr. Avenatti was the subject of their complaint. And my reaction is I don't know why we care what the Nike lawyers thought. Why is that relevant exactly?

MR. SREBNICK: This is going to be the subject of extensive briefing, your Honor, but to summarize, it takes a little bit -- you know, stepping back, September of 2017, Adidas gets brought into -- not the company being charged itself -- but Adidas executives were charged, including a former director of the Nike Basketball League were charged here in the Southern District of New York. At the same time Nike receives a grand jury subpoena for documents. Over the course of the next year and a half I believe Nike -- and I don't have

all the details -- was responding to the grand jury subpoena, and certainly on March the 25th, the date of Mr. Avenatti's arrest, Mr. Berman in a press conference said that the investigation of Nike is continuing.

So, when the Nike lawyers on March 19 decided to go to the U.S. Attorney's office, they were doing that in cooperation mode because they knew their own client was under investigation, that their own client had responded to grand jury subpoenas that we have outlined for the Court all of the arguable misconduct that was in their production to the government, and they had a motive to --

THE COURT: That much I understand. I understand that. But again you said that it was about Mr. Avenatti, that somehow it's important for the jury to understand the motivations for the Nike lawyers vis-a-vis Mr. Avenatti.

I totally understand your point that Nike itself was under investigation and had a motive to curry favor with the government. That is obvious and I acknowledge that, but the piece that's missing for me is the "it's important for the jury to understand the connection with Mr. Avenatti," you know, and that's why they went to the U.S. Attorney's office. And that goes beyond the motive of entity that's under investigation to curry favor with the government. That's a different point, and it's that point that I am trying to understand.

MR. SREBNICK: Understood. Fair question. I think

the best way I can answer it is if it was Joe Smith instead of Michael Avenatti, I think the Nike lawyers would have thought it would be less likely to get traction with the U.S. Attorney's office, and the reason for that is Mr. Avenatti had already been publicly spatting with the U.S. Attorney's office over the Stormy Daniels case, and there were some issues back and forth about whether one party had leaked to the media an interview that was about to take place. You know, the reality is Mr. Avenatti was a higher profile individual, and I think it's a fair question or fair area of inquiry of the Nike lawyers whether the fact that he was who he was was something that they thought would get more traction with the U.S. Attorney's office. So that's really the thrust of the argument.

THE COURT: OK. Well, I'm dubious, but I look forward to your submission, and I'd like it by a week from today.

But let's run through the rest of them. The second one was evidence or argument that Mr. Avenatti's conduct can or should be dealt with solely as an administrative or civil matter. Do you anticipate making arguments or offering evidence that goes to that issue?

MR. SREBNICK: No, your Honor.

THE COURT: Evidence or argument concerning whether the charges in this case are unconstitutionally vague. Again, that's the subject of one of your motions, but assuming my

ruling on the point is adverse to you, would you be arguing to the jury that it's unconstitutionally vague? I gather this would be the honest services wire fraud count. I mean do you intend to stand up in front of the jury and say, ladies and gentlemen, this is unconstitutionally vague?

MR. SREBNICK: No, your Honor.

THE COURT: Punishment or consequences. It's standard that there won't be any evidence or argument about punishment. You don't intend to get into that, do you?

MR. SREBNICK: No, your Honor.

THE COURT: Evidence or argument concerning the defendant's prior commission of good acts and/or failure to commit other bad acts. Do you have anything in mind in that area?

MR. SREBNICK: I don't anticipate putting on any affirmative evidence in the defense case. There might be evidence in the discovery that already deals with that. I think it's better if I leave that for writing, so I can articulate it better.

THE COURT: All right. Evidence or argument concerning whether other threatened or actual civil lawsuits have achieved positive things for clients or society. Does anything come to mind in that area that you might be seeking to introduce or to argue?

MR. SREBNICK: Nothing that comes to mind. I think

what is motivating this, Judge, is that we had submitted in reciprocal discovery to the government a number of civil complaints that Mr. Avenatti had filed in cases in the last five years, federal complaints. And I'm OK to say that the relevance of that is to show that Mr. Avenatti actually is a lawyer who files civil complaints; he actually sues; and he's not somebody who is just making threats about it. So, we think that's going to be relevant. We're not doing it to show that he achieved positive results, only to show that he is an actual trial lawyer who files lawsuits.

MR. RICHENTHAL: That is difficult to understand. It's not in dispute he is a lawyer. In fact, we had a long argument earlier about what the duties and contours of those duties are as a lawyer. There is not going to be a dispute from anyone, including a government witness, that Mr. Avenatti is a lawyer and he didn't start becoming one yesterday. This seems to us like a backdoor way of getting in prior acts for their alleged positive contributions, and we object to it.

THE COURT: So what I hear from you, Mr. Srebnick, is it's important to you to establish that Mr. Avenatti was a real lawyer, did real things, he tries cases, he brings lawsuits. I'm not sure the government is going to be disputing any of that. Do you intend to get into the details of lawsuits that he has actually brought?

MR. SREBNICK: No, your Honor.

THE COURT: OK. I don't think this is an issue, but if the government has concerns, after we see Mr. Srebnick's response you will let me know.

Evidence or argument concerning whether Nike engaged in misconduct of which the defendant was unaware at the time of the defendant's charged actions. So, there is a couple of areas like this, and the government is saying that it's not relevant if Mr. Avenatti was not aware of certain things at the time. So, they're saying both in this category and in the next one that unless it's connected with something he knew at the time it's irrelevant. Do you have a problem with that basic proposition?

MR. SREBNICK: I do, and I'd prefer to address this in writing, if I could.

THE COURT: All right. So for these next two you will give me something in your submission.

So, the one was misconduct Nike was engaged in that Mr. Avenatti was unaware of at the time. Then the next one is evidence or argument concerning whether Client One's potential legal claims had value and/or the coast of an internal investigation without a connection to the defendant's contemporaneous knowledge.

So, what the government is saying is that again if there is no tie to what Mr. Avenatti knew at the time, it's irrelevant. Same issue. So you will address that, Mr.

Srebnick.

MR. SREBNICK: Yes, your Honor.

THE COURT: Out of court statements made by Attorney One to the government after the defendant was arrested. I assume -- and I don't know who is going to be a witness in the case, but I assume this is outside cross-examination, right? I mean this is direct evidence that we're talking about, right?

MR. SREBNICK: I think this argument assumes that Attorney One will be unavailable at trial.

THE COURT: OK.

MR. SREBNICK: I think that may be an issue. I have subpoenaed Attorney One.

THE COURT: OK.

MR. SREBNICK: I don't know what Attorney One is going to be doing in response to the subpoena.

THE COURT: All right.

MR. SREBNICK: And so I think that issue needs to sort of play out depending on what he wants to do. But I think the government's motion is a response to a notice I gave under Rule 807. There may be other rules of evidence -- statements against penal interest, things of that nature that might support any out-of-court statements that he made if he is unavailable.

THE COURT: OK. I think I saw someplace in the briefing of the correspondence some issue about the assertion

of the Fifth Amendment in front of the jury. Is that an issue that people are concerned about?

MR. PODOLSKY: That was actually raised I think in a prior conference. Mr. Srebnick actually asserted that he had an intent to try to call people for the purpose of having them assert their Fifth Amendment right.

THE COURT: Is that still your intention, Mr. Srebnick?

MR. SREBNICK: Let me just research the law on that.

THE COURT: I will tell you that my inclination would be not to permit that, that is to say not to permit someone to be called to the stand solely for purposes of asserting their Fifth Amendment rights. I would not be inclined to permit that. Obviously, I'm happy to take a look at any law you want to submit on the subject, Mr. Srebnick, but that would be my inclination.

Finally, the government argues that the defendant should be precluded from offering expert testimony without providing sufficient notice, and his proffered expert should be precluded from opining on what a lawyer's ethical duties should be, the allegedly negative consequences of the government's theory of guilt and/or what statements made to the defendant meant.

So that's one of the reasons why I asked the government are you troubled by anything in Mr. Srebnick's

disclosure about the rebuttal expert?

MR. PODOLSKY: Sorry, your Honor, yes. We still do rest on the arguments in here about that. The disclosure seems to suggest there be arguments that go to what the rules really ought to be, whether this is good for lawyers to have criminal law in this area. And there is also a portion of the notice, as I recall, that essentially contains an interpretation of what one of the recorded statements by not Mr. Avenatti but another person on the recording meant. And that would be for the jury obviously to determine.

THE COURT: All right. Mr. Srebnick, do you have any reaction today about the government's concerns that are set forth in that last paragraph?

MR. SREBNICK: I don't. I think it's best to see what their enhanced notice looks like, and then I will be able to assess what we want to do with our expert witness.

THE COURT: OK. So again, Mr. Srebnick, your response to the government's motion in limine will be due on December 24.

The defendant had made a motion for a bill of particulars which is docket number 31. That was aimed at the conspiracy counts which are no longer in the case. Mr. Srebnick, I assume that motion is moot at this point.

MR. SREBNICK: Yes, your Honor.

THE COURT: I'm going to schedule a final pretrial

conference for 2 p.m. on January 17. That's the Friday before the trial. Obviously if we need to meet before then, we will, but we will have this final pretrial conference on the calendar if we need it.

Are there matters that the parties want to raise?

MR. PODOLSKY: I just couldn't quite hear. Is it 2 p.m. on that Friday, your Honor?

THE COURT: Yes.

MR. PODOLSKY: Thank you.

THE COURT: Mr. Srebnick, anything else you want to raise?

MR. SREBNICK: No, your Honor.

THE COURT: Nothing else for the government?

MR. PODOLSKY: Your Honor, we will also file oppositions to the defense's remaining motions in limine that we haven't discussed today on Tuesday. We may also file something regarding basically a supplemental motion in limine in response to one of the defendant's request to charge that raised an issue that we thought was not an issue, but assuming we do that, we will do it expeditiously so that your Honor can have that.

THE COURT: Do you think again by Tuesday?

MR. PODOLSKY: Probably sooner. We're actually hoping to do it quite soon.

THE COURT: All right.

MR. SREBNICK: Your Honor, there was actually one other matter I do want to bring up. In view of what I believe are more complexities in this case -- despite that there is only three charges -- than the average case, we would ask that the Court consider scheduling a pretrial charge conference in the case so that we have a better understanding of what the Court's intentions are with respect to the jury instructions.

There is quite divergent views of what the instructions ought to be, especially on the definitions of what is wrongful under the extortion statute, the requirement of what the act needs to be under 1346. So, I think it would certainly be useful to engage in that process so that we have an idea of what we shouldn't be arguing to the jury and what we can be arguing to the jury.

MR. PODOLSKY: May I respond, your Honor? Let me first raise this: We have read certainly the defense's request to charge. We think they're wrong in numerous respects and involve numerous misstatements of law, and we are considering whether we want to put something in writing to assist the Court.

We certainly don't want to get in the way of anything that will help move things along in this case, but candidly I don't think that a pretrial charge conference is just a useful process or a good use of the time as we're trying to prepare for trial. And I think that for several reasons.

One, to the extent it's useful, we can provide some additional reactions in writing, but so much, as the Court knows, about what goes into the charge is going to be dependent on what happens at trial. We will have, I am confident, a charge conference at the normal time, and I'm just not sure sitting around and hashing it out on another half day is really helpful to anyone.

And I will make one other comment. It is true that the defense has thrown in any number of additional charges or changes to charges that are given based on, in our view, not on legal authority, but that doesn't actually mean that the charges in this case are very complicated. They have been given before. Honest services fraud is a charge that is given routinely in this courthouse.

THE COURT: But generally in the context of public officials.

MR. PODOLSKY: That's true, as well as though in the private sector. I had a private sector honest services fraud trial earlier this year, and the principles really apply equally.

I'm not trying to suggest, your Honor, that there won't be anything to discuss at the charge conference -- there always is -- but as we were preparing the requests to charge there is clear legal precedent on each of these charges. We think that we can certainly elucidate any particularly knotty

questions in writing ahead of time, and we are going to have a charge conference. So, I just don't think it's a profitable use of time, although clearly we will provide the Court with whatever the Court would like in terms of assistance in determining the charge in this case.

THE COURT: Well, I think the place to start would be a response from the government to the charges that you said that the defendant seeks that are supported by the law, so that I have some sense of the universe of disagreement between the parties. And once I have a sense of that, it will be easier for me to decide whether it would be productive for us to have this pretrial discussion about the charge.

I tend to agree with the government that it's very difficult to have a discussion about what the jury instructions are going to be before the judge has heard the evidence.

I will say that in this case a lot of the evidence has already been disclosed, and so maybe that's somewhat unusual -- disclosed in the sense that much of the evidence is product of taped conversations and messages that are in black and white. But I won't really have a sense of whether it would be useful for us to speak before the trial begins until I get the government's reaction to the instructions of the defendant as sought and have a better understanding of what the areas of disagreement are.

So, can you get me that by Tuesday or earlier?

MR. PODOLSKY: Your Honor, I will say this, if the Court will indulge us. We will try, but we would ask the Court's indulgence in terms of setting a deadline to the following week. And the reason I'm asking for that is simply the number of filings in addition to some we have discussed today due Tuesday, and we certainly want to have enough time to make it a useful submission to the Court. We will endeavor to get it to you quickly, but if the Court would indulge us not to set a strict deadline of Tuesday, we would find that useful.

THE COURT: All right. Do the best you can. The sooner I get it, obviously the better it is for me, but I understand you do have a number of other submissions that you're required to make.

MR. SREBNICK: When would the Court be inclined to share its proposed instructions? Would that be before trial starts, or is that at the end of the government's case?

THE COURT: It's never before the trial starts, I can tell you that. I mean I have never that I can remember given the parties my charge before I have heard any of the evidence. That would be unprecedented. The government is right, you know, of the people sitting in the room I have probably the least understanding of what the evidence is going to be. So, the judge needs to hear the evidence, understand what the factual issues are generally speaking before you can address the substantive instructions.

Of course there are instructions that are given in practically every case, and I am sure the lawyers aren't concerned about that, and they have a good idea of what those instructions will look like, but the substantive instructions about the charges in this case, those typically would be developed at some point during the trial and given to the parties maybe a couple days before their summations would be a possibility. But generally the judge needs to hear the evidence before he or she can make decisions about the specific language that will be used in the jury instructions.

So, Mr. Srebnick, it would be unprecedented for me to disseminate the charge before I've heard any of the evidence, and I don't think that's going to happen in this case. But if you want me to consider giving the draft charge out than I otherwise might, I certainly will consider that. Again, what I need is sort of the predicate, to get this submission from the government and have a better understanding of where the parties are at odds, and then I will certainly think about whether it would be helpful to have a conference with you earlier than I otherwise might about the legal instructions.

And what I'm hearing from you is that if you had a sense of what the legal instructions were going to be, it might have a bearing on what evidence you chose to elicit, and it might address objections that will be raised during a trial due to a lack of uncertainty about what the ultimate jury

instructions are going to be.

So, I'm sensitive to that issue; I will think about it. I will start by looking at the government's response to what you've submitted, and I will continue to consider whether it might make sense for us to have an earlier conversation about the law than I otherwise would.

MR. SREBNICK: Understood.

THE COURT: OK. Anything else?

MR. PODOLSKY: Not from the government, your Honor.

MR. SREBNICK: No, your Honor.

THE COURT: All right. Thank you.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 19 CR 373 (PGG)

MICHAEL AVENATTI,

Defendant.

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New York, N.Y.
January 15, 2020
4:15 p.m.

Before:

HON. PAUL G. GARDEPHE,

District Judge

APPEARANCES

GEOFFREY S. BERMAN,
United States Attorney for the
Southern District of New York
MATTHEW D. PODOLSKY
DANIEL RICHENTHAL
ROBERT SOBELMAN
Assistant United States Attorneys

JOSE M. QUINON
SCOTT A. SREBNICK
DANYA PERRY
Attorneys for Defendant

(In chambers; parties present telephonically)

THE COURT: Hello. This is Judge Gardephe. Who do I have on the line?

MR. PODOLSKY: For the government, you have Matthew Podolsky, Daniel Richenthal, and Robert Sobelman. Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. QUINON: Good afternoon, your Honor. On the line, for the defense, you have Jose Quinon, Scott Srebnick, and Danya Perry. Howard Srebnick could not make it, but the rest of us are on the line.

THE COURT: All right.

So I take it defense counsel is waiving Mr. Avenatti's presence for purposes of this call?

MR. S. SREBNICK: We do, your Honor.

THE COURT: Okay.

So I have been informed by the government that the court in California ordered Mr. Avenatti detained. The government's letter tells me that the California judge ordered the Marshals Service to bring Mr. Avenatti to this district forthwith.

Let me ask the government: Is there anything I need to do? Do you need an order from me to facilitate this?

MR. PODOLSKY: We don't believe it's necessary at this time, your Honor. We're going to be in touch with the Marshals

Service, and to the extent we need any further assistance from the Court in the next day to make sure he's here in a timely fashion, we will follow up, but our current understanding is that the district judge's order in California is sufficient to ensure that the defendant will be transported here by next week.

THE COURT: Now, I'm hoping he's going to be here by Friday. Is that unrealistic?

MR. PODOLSKY: That's our hope as well, your Honor. I don't think I have a guarantee as to what day from the marshals, but I believe Friday -- my understanding is Friday was included in the district court in California's order, so it's certainly our hope and belief that he will be here by Friday. And to the extent we can help, we will be working to make sure that happens.

THE COURT: I spoke with someone from the marshals office earlier today and came away from that conversation with the understanding that Mr. Avenatti would be here by Friday. So I am going to operate on that presumption.

Let me ask the lawyers whether -- we have to talk about the trial date, obviously. I'm wondering whether it's reasonable to move the date for distributing the jury questionnaires to Thursday, doing the voir dire on Friday, and then beginning with the evidence the following Monday.

Mr. Quinon, Mr. Srebnick, Ms. Perry, what's your

reaction?

MR. QUINON: Judge, this is Jose Quinon. The problem that we're having here goes much beyond just the movement of starting the voir dire, Judge. Here's the -- the more fundamental problem that we're having is one that we normally do not have representing clients, and that is, as we're ready to start the trial, we don't have the wherewithal, we don't have the resources, to have the tools that we need to represent the client. In this case, we are not going to be able to bring our expert. We have no way to assure the expert or to pay the expert to appear at trial. We cannot also pay for the witnesses that we have subpoenaed, and they, of course, are entitled to their mileage, their flights, lodging.

So we have some very, very difficult problems here. Apart from that, we have also had contracted with somebody for technical assistance and being able to make the presentation necessary at trial in order to competently represent Mr. Avenatti. So, as we're getting ready to tee the trial up, to start this trial, we find ourselves that the rug has been pulled from under us because this was absolutely totally unexpected, and now we just don't have a way of doing it.

Now, what I suggest is that we need time to be able to speak with Mr. Avenatti about these issues. I don't know if he has resources, but based on what little I know about the California case, we have also problems there, insofar as

Mr. Avenatti coming up with any type of resources, because the California case seems to be rather broad in scope in terms of embracing all of Mr. Avenatti's potential resources.

So, nonetheless, we need to talk with Mr. Avenatti about that issue. We may need, eventually -- and I don't know this until we speak to Mr. Avenatti. We may need to have Mr. Avenatti come before the Court and have an indigency hearing.

So, it's a long answer, but it is an answer that we need to ponder and we need to deal with in this case, is what are we going to do with this issue of the finances, because without that, we can't move forward the way that we see it because we don't have the tools, we don't have the weapons. It's like going to war without weapons on our side right now. Only the government has resources. We don't have any.

And, as Mr. Srebnick explained before, we were dealing with very little resources and now we have none. So that's the issue, Judge. And I think that unless this issue with the resources is resolved, we cannot move forward. At least that's the way we see it. And so, it may be that, at this point, we may have to do kind of a hard reset, so to speak, because I don't see -- unless -- I ask the Court for assistance here because, quite frankly, after 40-some years of practicing law, I've never encountered a situation like this. On the eve of trial, we're just left out naked in the street and no way to

defend ourselves.

THE COURT: Well, what exactly is your application?

MR. QUINON: I think we need to just adjourn the trial, reset it, give us an opportunity to speak with Mr. Avenatti, come before you sometime, hopefully, next week, Tuesday or Wednesday, with Mr. Avenatti in court, and select a new trial date after we resolve the issues of the finances because that is the key right now.

THE COURT: What does the government say?

MR. PODOLSKY: Your Honor, we oppose that application. Let me first say this: We're not unsympathetic, as we said this morning, to the sort of interim hardship caused by Mr. Avenatti's arrest in terms of the defense's ability to communicate with him and prepare their case. We understand that.

But with respect to the notion that there's a financial hardship that should cause him sort of adjournment sine die or a hard reset, whatever that may mean, we simply don't understand how the arrest has any bearing on that. The defendant was arrested, but, to our understanding, no money was seized from him. His financial condition is exactly the same today as it was yesterday and the day before.

If the defense needs to seek CJA resources, we understand that that may be an avenue available to them, but we don't see how the defendant's arrest really is relevant to the

concerns that Mr. Quinon has articulated now. So, I'm happy to respond to the Court's proposal regarding jury selection and the first day of trial, but we do oppose the application that there should be some sort of reset or adjournment without a deadline. The government, as well as the public, has an interest in a trial here, and we don't see any reason that it can't proceed along the lines of the schedule that the Court has proposed.

MR. QUINON: May I respond to -- let me say that the government does not understand how it affects Mr. Avenatti. He had the same amount of money yesterday as he does today, and that may be true, but the circumstances have changed radically.

As an attorney, now you're on notice that there is a case in California that deals with the money in this case, and there's allegations that use of the money and the way that it has been used has obviously given rise to criminal charges. Under no circumstances -- I know that we would be very, very, very reluctant to use that money or advise Mr. Avenatti how to or whether to use the money. As a lawyer, you're walking on really, really thin ice here, and one has to be very careful.

Second of all, it is doubtful that the vendors in this case are going to take the money without inquiry, whether they can take the money without any problems, meaning any legal problems.

Now, the only way this can be resolved is

Mr. Podolsky, on behalf of the government, says to us, okay, Mr. Avenatti can use the money, and there will be no legal problems for either Mr. Avenatti or for any of the vendors, then, fine, we'll move ahead and do it, but we have to have that assurance. And I cannot, and neither will any of the defense lawyers, take it upon ourselves to give assurance to other people, whether Mr. Avenatti or any vendor, that there's no problem with the money.

Now, if Mr. Podolsky, on behalf of the government, gives us that assurance, then, yes, we can move forward. So I'll put the ball in his park and let him say it. If he can give us the assurance, then we'll move ahead, no problem.

MR. S. SREBNICK: Let me just interject one thing. This is Scott Srebnick. We also have to find out -- none of us knows Mr. Avenatti's finances, so we need to have a conversation with him about his ability, in light of the new allegations, to fund the resources, witness fees, et cetera, trial tech support, to move forward. Until we have a conversation with him, we have really no way of knowing.

THE COURT: When do you expect to have that conversation?

MR. S. SREBNICK: As soon as he's brought to New York. I'm scheduled to fly up tomorrow, and I will meet with him as soon as he is brought to New York, whenever that is. I think there's a separate issue, and that is, I don't know if he has

anybody on the outside who handles finances that can make any such arrangements. I just don't have the answer to that question.

So as a lawyer, I don't get involved in my client's finances, and so I don't know, in custody, what his ability is to make arrangements. If he has the finances, if he has the funds to pay, I just don't know. So I need to have that conversation with him to find out.

All of this is, of course, against the backdrop that Mr. Quinon mentioned, which is the government in California has apparently taken the position that certain payments, certain expenditures, constituted mail or wire fraud. I suppose that they're alleging that the way it was structured constitutes evidence of criminality. I just don't have personal knowledge of that, but, as Mr. Quinon said, we have to tread very carefully under these circumstances.

THE COURT: Well, I think the first step is, obviously, for defense counsel to have an opportunity to speak with Mr. Avenatti about these matters. I think the next step is for defense counsel to have a conversation with the government here to see whether some comfort can be given about the expenditure of funds for purposes of trial preparation and then take stock of where we are after those conversations have taken place.

It's clear that the trial date for Tuesday has to be

adjourned. What I'm hearing from counsel is that my proposal to at least try to make progress on jury selection next week is a nonstarter. So, instead, I'm going to put it down for a conference at 10:00 a.m. Tuesday morning, by which time I expect that Mr. Avenatti will not only have been brought to this district, but that there will have been an opportunity for substantive conversations between him and his counsel.

We have a conference scheduled for later today at 5:30 that's obviously not going to happen. We had scheduled a conference for what was supposed to be our last pretrial conference for Friday at 2:00. That will be adjourned. Instead, we will have our conference on Tuesday morning, 10:00 a.m.

With respect to the trial date, the adjourned trial date, I'm going to leave that in abeyance for now. I will tell you that I would be very reluctant to push the trial date beyond the following Monday, so I would be very reluctant to push the trial date beyond Monday, January 27th.

So understanding we're not going to be able to make any progress next week, I want the trial to begin at least by January 27th.

There are a number of outstanding submissions. I assume that until defense counsel has an opportunity to speak with Mr. Avenatti, there's not going to be any progress on that front, but just to keep them as markers, I'm waiting for a

submission from defense counsel as to the financial condition evidence and, in particular, the various judgments that the government has made reference to. So, in the defendant's opposition papers to the financial condition evidence, it said that Mr. Avenatti disputes the government's claim that he was $15 million in debt as of March 2019, but as I've spent time with the papers, it seems that there are a number of judgments that have been entered against Mr. Avenatti, and so I'm not really clear what the basis would be to dispute those judgments, which is one of the reasons why I've asked the defense to comment.

So, as I understand it, there's a personal judgment against Mr. Avenatti for approximately $5 million that was entered on November 20th, 2018, by the Los Angeles Superior Court; there was a judgment of 2.1 million entered by the Santa Barbara Superior Court on or about October 26th; on or about January 17, 2019, the Orange County Superior Court, in connection with Mr. Avenatti's divorce proceedings, issued a writ of execution against him in the amount of $2,053,332; and then on January 17, 2019, the State of Washington filed a warrant for unpaid taxes in Superior Court Thurston County against Mr. Avenatti in the amount of $1,530,216.

So, I'm not sure how those amounts could be disputed, and so I'm looking to the defense to tell me whether they dispute those numbers, and, if they do, what their basis is.

I want to tell the government that I did receive the government's motion for an arrest warrant in the California case. I would like to see the exhibits that were attached to that brief. So what I have now is the brief; I don't have the exhibits. I'd like to see the exhibits.

Mr. Srebnick, you had mentioned that you want to file a motion regarding Mr. Geragos, so that's an outstanding matter. And then, finally, Nike has moved to quash a subpoena issued for certain documents, and I assume that the defendant opposes that motion, so I'll need a response, I'll need opposition to that, if the defendant opposes that motion.

So I understand there's a delay -- there's going to be a delay associated in this briefing, in light of the arrest and detention of Mr. Avenatti, but I just wanted to remind everyone that these are outstanding matters that I am going to need briefing on.

MR. PODOLSKY: Your Honor, this is Matthew Podolsky, for the government. Just in response to your request for the exhibits, we did docket them a little bit later than the motion, but the exhibits, I believe, are docketed now at Docket No. 155. So, hopefully, that satisfies the Court's request for the exhibits underlying the motion for an arrest warrant filed in California yesterday.

THE COURT: All right. I'll look for that.

MR. S. SREBNICK: Your Honor, it's Scott Srebnick.

May I address one matter?

THE COURT: Yes, go right ahead.

MR. S. SREBNICK: Does the Court anticipate that it would rule on the entire expert witness issue before the commencement of trial? I ask that only because, as far as anticipated expenses are concerned, that would be the largest, and so I would want to address that with Mr. Avenatti as soon as I see him.

THE COURT: When you say the expert -- as I understand it, you want to put on an expert with respect to California Bar matters, right? That's one expert that you were going to call, or not?

MR. S. SREBNICK: No, no. We had moved to exclude the government's expert.

THE COURT: Okay.

MR. S. SREBNICK: We engaged, on a very limited basis, an expert as a rebuttal expert to the government's, but it's our position that California Bar rules ought not to be the subject of expert testimony. That's something we talked about at the December 17th hearing, the Court gave us its sort of inclination view, and then the government supplemented with a notice, I filed a letter to exclude it, and that matter is pending before the Court.

THE COURT: Okay. So the expert you're talking about is on these financial matters?

MR. S. SREBNICK: No, no, no. There's only one expert. It's the California -- I'm sorry, there's only one expert at issue -- only one area of expert testimony at issue that both sides have noticed. And that's on California Bar rules ethics.

THE COURT: All right. We're getting confused here.

First of all, I was just trying to figure out whether the expert you were referring to was on California Bar matters. I gather that's not what you're talking about, right?

MR. S. SREBNICK: That is the only thing we're talking about.

THE COURT: Okay. In your papers opposing the government's financial condition evidence, you said that it might be necessary for you to retain an expert to testify about Mr. Avenatti's financial condition.

MR. S. SREBNICK: Yes, that was one point, but we don't know what the Court's ruling is yet on that, and, certainly, we'd have to talk to Mr. Avenatti. But, no, the only experts that either side has retained at this point is on California Bar rules. And I can just tell the Court that we have not paid our expert to actually travel to New York and to testify. That would be an anticipated expense of probably in excess of $20,000, given the amount of time, et cetera.

So the government has its expert, a professor from Stamford, and that issue is teed up for the Court, as to

whether or not any expert testimony on ethics, legal principles, et cetera, ought to be part of this trial. And so that's the issue I was referring to, and I'm sorry if I wasn't clear.

THE COURT: Okay.

So your concern that -- well, first of all, I mean, I've given you a preview that my inclination is that the subject matter is an appropriate one for expert testimony because the average juror is not going to be conversant with the responsibilities of attorneys under the California rules of ethics and professional responsibility. So that's my general view, which I think I shared with you a long time ago. And then there were some issues about whether the government's disclosure had been appropriate, and the government supplemented its disclosure, and then, you're correct, you put in a letter that's still sub judice, opposing the expert testimony.

I understand what you're saying, that if I were to rule that the expert testimony about lawyers' responsibilities in California, under California law, if I were to rule that evidence on that point is admissible, you would then need to put on your expert, and you're concerned that you don't have the funds available to do that.

MR. S. SREBNICK: That's correct.

THE COURT: Okay.

So, as I said, you're going to have your conversations with Mr. Avenatti when he arrives here, you will then have a conversation with the government about whether, as has been done in many other cases, over many years, whether some amount of money could be released to pay for defense costs, and if you don't receive satisfaction in that regard, then you'll bring the matter to my attention on Monday, I guess -- I'm sorry, Tuesday.

MR. PODOLSKY: This is Matthew Podolsky, for the government. I just want to follow up on one thing the Court said to make sure there's no misimpression. There is no money that is being held or seized for forfeiture or anything like that by the government. We aren't holding any of the defendant's assets. The issue isn't whether we would release them so that he can provide for his defense. As I understood the defense's request, they wanted some kind of warrant that he can do whatever he wants with his money and the government wouldn't view it as a crime. So I just want to make sure that we're not talking past each other. It's a slightly different issue than the matter of the release of money.

It may be -- I don't know the answer to this, candidly, your Honor -- that the Central District of California has seized some assets, I'm not sure what the answer to that is, but we -- from its earlier case, but this office did not seize any of Mr. Avenatti's assets, we're not holding them to

prevent him from using them or anything like that. So I want to make sure the record is clear on that.

THE COURT: I'm aware of that. But it's not that dissimilar from a situation where funds have been frozen in the sense that what defense counsel has said today is that, given the allegations in the government's motion for the arrest warrant, which were the predicate for Mr. Avenatti's detention in California, given those allegations, which focus primarily on Mr. Avenatti's financial transactions over the past year, what defense counsel is saying, is that given those allegations in the government's brief, it presents practical difficulties, in the sense that anyone reading -- any vendor reading those allegations is going to have a level of concern about whether the money that Mr. Avenatti provides is going to be viewed, essentially, as the proceeds of fraud, such that they might later face a demand on the government's part to disgorge the money they receive from Mr. Avenatti.

So I take your point that it isn't a situation where funds have been frozen, but the concern is very similar to that scenario because an issue has been raised about whether funds that Mr. Avenatti has control over, whether they're tainted and whether a vendor who takes those funds does so at some risk. And that presents a practical problem.

MR. PODOLSKY: Your Honor, I certainly understand the practical problem, and we'll continue to confer both internally

and with the defense. The issue I foresee, your Honor, is the allegations, as I understand them, or the concern here, is that if Mr. Avenatti spends money that somebody -- that is owed to somebody else, that could constitute a crime or where that person may be able to go after the money, and it's hard for us to sort of prospectively immunize him for what that conduct might constitute. I'm just not sure I immediately see even a mechanism for doing that. But we understand your Honor's analogy, and we're happy to confer internally and with the defense to see if there's something we can do.

THE COURT: Well, I do think we have to be practical here. We've had significant disruption with respect to the trial date already. It remains entirely unclear to me why it was decided to arrest Mr. Avenatti a week before the trial based on allegations that go back primarily to last summer. So I read the government's brief in support of the arrest warrant. It was chockful of events that happened between June and August of 2019. So it raises the obvious question of why did someone wait until January 14th to seek an arrest warrant? So that's created enormous disruption. And unless the parties cooperate effectively, I really have no idea when this case is going to get tried. Mr. Avenatti has a trial scheduled in April, he has a trial scheduled in May. I have 600 other cases I'm responsible for. And so what I'm asking is that people be practical here, given the hand we have been dealt, which is a

bad one. That's what I'm asking for.

MR. PODOLSKY: Your Honor, this is Matthew Podolsky again. We absolutely will be practical. Let me say this: We agree with you, your Honor. We were prepared to try this case next week. As you know, we did not know that an arrest warrant was sought until after it was. The hand that the Court has been dealt, unfortunately, is also the hand that we've been dealt, and so we're in full agreement with the Court. We will make every effort to be practical and move this case along.

As I said, our only interest, which we believe is a public interest, is to try this case as expeditiously as possible, and we will absolutely do everything in our power to do that. But I want to emphasize, your Honor, we're in full agreement with the Court.

THE COURT: All right.

Mr. Srebnick, Mr. Quinon, anything else anyone wants to say?

MR. S. SREBNICK: No, your Honor. Thank you.

MR. QUINON: No, your Honor. Thank you.

THE COURT: All right. So we will regroup at 10:00 a.m. on Tuesday morning. If there are any issues that arise in terms of Mr. Avenatti's transport or if you need anything else from me, let me know.

MR. S. SREBNICK: Judge, while we're on the line, may I just ask the government to, to the extent they can, let me

know as soon as they expect Mr. Avenatti to be in New York, so that I can make arrangements to travel up there immediately.

THE COURT: So, Mr. Podolsky, will you keep Mr. Srebnick apprised of what's going on in terms of transport?

MR. PODOLSKY: Yes, your Honor, to the extent we know and are able to, we will continue to confer with defense counsel, as we have been. The answer is, yes, to the full extent of our ability.

THE COURT: All right.

I assume we'll be in 705 on Tuesday, so you should report to courtroom 705 Tuesday morning, 10:00 a.m.

MR. S. SREBNICK: Thank you, your Honor.

MR. QUINON: Thank you, Judge.

MR. PODOLSKY: Thank you, your Honor.

THE COURT: All right. Thank you, all.

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